Supreme Court, U. S.
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In The

Supreme Court of the United States

October Term, 1979

No. 79-1948

WINNEBAGO TRIBE OF NEBRASKA,

Petitioner,

vs.

COL. JAMES W. RAY, DISTRICT ENGINEER, OMAHA DISTRICT, UNITED STATES ARMY, CORPS OF ENGINEERS, IOWA PUBLIC SERVICE COMPANY, AND NEBRASKA PUBLIC POWER DISTRICT,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MICHAEL D. GOOCH
LAWRENCE HAMMERLING
InterTribal Legal Services
Rt. 1, Box 66A
Winnebago, Nebraska 68071
Counsel for Petitioner

COCKLE PRINTING CO., 2311 Douglas St., Omaha 68102

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Respondents.

———o———

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE EIGHTH CIRCUIT

———o———

To the Honorable, The Chief Justice and the Associate Justices of the Supreme Court of the United States:

The Winnebago Tribe of Nebraska, the Petitioner herein, prays that a Writ of Certiorari issue to review the judgment of the Court of Appeals of the Eighth Circuit entered in the above entitled case on March 13, 1980.

———o———

OPINIONS

The opinion of the Court of Appeals for the Eighth Circuit is unreported, but is attached to this petition as Appendix A, infra, page App. 1. The Court of Appeals affirmed the United States District Court for the District of Nebraska, whose opinion was entered on June 29, 1979, and is unreported, but is attached to this petition as Appendix B, infra, page App. 13.

JURISDICTION

The judgment of the Circuit Court of Appeals for the Eighth Circuit (Appendix A, infra, page App. 1), was entered on March 13, 1980. Jurisdiction of the Supreme Court is invoked under Section 28, U. S. C. § 1254 (1).

QUESTIONS PRESENTED

1. Did the United States Army Corps of Engineers violate the National Environmental Policy Act of 1969 (NEPA), 42 U. S. C. § 4321 *et seq.*, the Council on Environmental Quality (CEQ) guidelines, and its own regulations when it issued a river crossing permit making possible the construction of a 66-mile, high-voltage, electric transmission line without reviewing the environmental effects of 98% of that line.
2. Did the Winnebago Tribe of Nebraska meet its burden of demonstrating a substantial environmental issue as to the endangered Northern American Bald Eagle at trial?

STATUTORY PROVISIONS AND REGULATIONS INVOLVED

This case involves the National Environmental Policy Act of 1969, 42 U. S. C. § 4332 (1976):

> § 4332. Cooperation of agencies; reports; availability of information; recommendations; international and national coordination of efforts.
>
> The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter, and (2) all agencies of the Federal Government shall—
>
> (A) utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man's environment;
>
> (B) identify and develop methods and procedures, in consultation with the Council on Environmental Quality established by sub-chapter II of this chapter, which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations;
>
> (C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—
>
> (i) the environmental impact of the proposed action.
>
> (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented.

(iii) alternatives to the proposed action.

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of title 5, and shall accompany the proposal through the existing agency review processes;

the Rivers and Harbors Appropriation Act of March 3, 1899, ch. 425, § 10, 30 Stat. 1151, Title 33, U. S. C. § 403 (1976):

§ 403. Obstruction of navigable waters generally; wharves; piers, etc.; excavations and filling in.

The creation of any obstruction and affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is prohibited; and it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures in any port, roadstead, haven, harbor, canal, navigable river, or other water of the United States, outside established harbor lines, or where no harbor lines have been established, except on plans recommended by the Chief of Engineers and authorized by the Secretary of the Army; and it shall not

> be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition or capacity of, any port, roadstead, haven, harbor, canal, lake, harbor or refuge, or inclosure within the limits of any breakwater, or of the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of the Army prior to beginning the same.
>
> (Mar. 3, 1899, ch. 425, § 10, 30 Stat. 1151.);

the Council on Environmental Quality (CEQ) regulations, 40 C. F. R. § 1500.5(a)(2) (1978):

> § 1500.5 Types of actions covered by the Act.
>
> (a) "Actions" include but are not limited to:
>
> • • •
>
> (2) New and continuing projects and program activities: Directly undertaken by Federal agencies; or supported in whole or in part through Federal contacts, grants, subsidies, loans, or other forms of funding assistance (except where such assistance is solely in the form of general revenue sharing funds, distributed under the State and Local Fiscal Assistance Act of 1972, 31 U. S. C. 1221 et seq. with no Federal agency control over the subsequent use of such funds); or involving a Federal lease, permit, license certificate or other entitlement for use;

the CEQ regulations, 40 C. F. R. § 1500.6 (a) (1978):

> § 1500.6 Identifying major actions significantly affecting the environment.
>
> (a) The statutory clause "major Federal actions significantly affecting the quality of the human environment" is to be construed by agencies with a view to the overall, cumulative impact of the action proposed, related Federal actions and projects in the area, and further actions contemplated. Such actions

> may be localized in their impact, but if there is potential that the environment may be significantly affected, the statement is to be prepared. Proposed major actions, the environmental impact of which is likely to be highly controversial, should be covered in all cases. In considering what constitutes major action significantly affecting the environment, agencies should bear in mind that the effect of many Federal decisions about a project or complex of projects can be individually limited but cumulatively considerable. This can occur when one or more agencies over a period of years puts into a project individually minor but collectively major resources, when one decision involving a limited amount of money is a precedent for action in much larger cases or represents a decision in principle about a future major course of action, or when several Government agencies individually make decisions about partial aspects of a major action. In all such cases, an environmental statement should be prepared if it is reasonable to anticipate a cumulatively significant impact on the environment from Federal action. The Council, on the basis of a written assessment of the impacts involved, is available to assist agencies in determining whether specific actions require impact statements;

the CEQ regulations, 40 C. F. R. § 1508.18 (1979):

> § 1508.18 Major Federal action.
>
> "Major Federal action" includes actions with effects that may be major and which are potentially subject to Federal control and responsibility. Major reinforces but does not have a meaning independent of significantly (§ 1508.27). Actions include the circumstance where the responsible officials fail to act and that failure to act is reviewable by courts or administrative tribunals under the Administrative Procedure Act or other applicable law as agency action;

the United States Army Corps of Engineers regulation, 33 C. F. R. § 209.410 (d) (2) (ii) (1978):

(ii) Should the District Engineer determine in assessing the impact of a minor action that an environmental statement is not required, the determination to that effect will be placed in the project file. This determination shall be made available to the public upon request and shall include a statement of the facts and the signer's basis and reasons for his decision. It will be signed by the District Engineer or higher commander and brought to the atention of the public by publication in the 3-year schedule (paragraph (f) of this section). Where more timely notification is essential, public notices may also be used. A minor action is defined as one which, following the completion of an environmental assessment, is determined not to have a significant impact on the quality of the human environment. If the District or Division Engineer is in doubt as to whether or not a statement should be prepared, further guidance must be requested in accordance with paragraph (d) (4) of this section. These determinations are reversible should controversy or other later events require an environmental statement to be written;

and the United States Army Corps of Engineers regulations, 33 C. F. R. § 325.4 (b) (1) (1978):

(1) The District Engineer, at the earliest practicable time prior to the issuance of the public notice, shall make a preliminary assessment of impacts of the project should it be approved and make a preliminary determination as to whether the quality of the human environment would be significantly affected. This preliminary assessment will normally be based on experience with similar type activities performed in the past. A statement of the District Engineer's preliminary determination shall be included in the public notice. This preliminary determination will be reconsidered as additional information is developed.

———o———

STATEMENT OF THE CASE

The Nebraska Public Power District (NPPD) and the Iowa Public Service Company (IPS) entered into a joint venture for the construction of a 345 kilovolt electric transmission line. The line was to run from the IPS substation in Raun, Iowa, a few hundred yards to the Missouri River, across that river and then more than 65 miles to the NPPD substation in Hoskins, Nebraska. Some 27 miles of that line were to run across the Winnebago Indian Reservation. The line crossed 29 parcels of land owned in whole or in part by the Winnebago Tribe and by individual members of the Tribe.

On July 13, 1978, IPS applied to the United States Army Corps of Engineers (Corps) for a permit to cross the Missouri River, as required by 33 U. S. C. § 403 (1976) (originally enacted as Rivers and Harbors Appropriation Act of March 3, 1899, ch. 425, § 10, 30 Stat. 1151) (hereinafter section 10). The Corps prepared an environmental assessment on the impact of the river-crossing portion of the line (approximately 1.25 miles of 66 miles). The Corps' assessment totally ignored the remaining 98% of the project. The assessment did not mention any possible adverse effect on Northern American Bald Eagles, an endangered species found in the project area. The Corps did not consider a number of viable alternatives.

The Corps granted the section 10 permit on January 10, 1979. On April 30, 1979, the Winnebago Tribe of Nebraska (Tribe) filed suit alleging noncompliance by the power companies and the Corps with the National Environmental Policy Act of 1969, 42 U. S. C. § 4321, *et seq.* (NEPA). The Tribe sought to enjoin construction and

condemnation pending compliance. The suit was brought under 28 U. S. C. §§ 1331 (a), 1361, and 1362 (1976).

At trial the Tribe demonstrated the entire Raun-Hoskins line would not and could not have been built absent the issuance of the section 10 permit allowing the power companies to cross the Missouri. It also demonstrated that the Corps completely ignored the 98% of the proposed project west of the Missouri's banks and did not consider several viable alternatives. The Tribe demonstrated that bald eagles were not considered in the Corps' negative declaration that was the result of its environmental assessment. The Tribe established that there is a substantial bald eagle population in the vicinity of the proposed power line. The Tribe established that there have been dead bald eagles found along the Missouri River and in both Iowa and Nebraska. The Tribe established that the third largest cause of death of bald eagles is electrocution. Impact injuries are the second largest cause of eagle mortality. Some bald eagles which receive these diagnoses are found under power lines. The Tribe established that bald eagles are in danger of extinction. The Tribe proved that power lines kill eagles and that the Corps did not consider this. The Tribe also showed that the clearing of brush adversely effects the habitat of part of the food chain of eagles, that noise during construction would disturb roosting eagles, and that the United States Fish and Wildlife Service has not determined that high voltage power lines are safe for migratory birds.

The District Court ruled against the Tribe by holding that the Tribe failed to meet its burden of proof. The Eighth Circuit affirmed the ruling of the District Court.

Both courts held the Corps action in assessing only a small part of the project was reasonable.

REASONS FOR GRANTING THE WRIT

1. The decision of the Eighth Circuit Court of Appeals in this case conflicts with the en banc holding of the Eighth Circuit in Minnesota Public Interest Research Group v. Butz, 498 F. 2d 1314 (8th Cir. 1974) (en banc) (MPIRG I), with decisions of other circuits, with the guidelines of the Council on Environmental Quality (CEQ), and with the Corps' own regulations.

The decision of the Eighth Circuit Court of Appeals in this case conflicts with *MPIRG I, supra,* decisions from other circuits, Council on Environmental Quality guidelines, and with the Corps' own regulations.

> The National Environmental Policy Act requires that:
> to the fullest extent possible . . . (2) all agencies of the Federal government shall . . . (c) include in . . . major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on . . . (i) the environmental impact of the proposed action . . . (iii) alternatives to the proposed action. 42 U. S. C. § 4332.

> The CEQ guidelines define "actions" to include:
> (2) New and continuing projects . . . involving a Federal lease, permit, license, certificate or other entitlement for use. 40 C. F. R. § 1500.5(a)(2) (1978).

These guidelines are entitled to substantial deference. *Andrus v. Sierra Club,* 99 S. Ct. 2335, 2341 (1979).

In *MPIRG I, supra,* the Eighth Circuit, sitting *en banc,* adopted a unitary test for whether a particular project or federal activity was "major federal action significantly affecting the quality of the human environment." 42 U. S. C. § 4332(2)(c). Other courts of appeal agree with this test. *Calvert Cliffs Coord. Com. v. A. E. C.*, 449 F. 2d 1109 (D. C. Cir. 1971); *City of Davis v. Coleman,* 521 F. 2d 661 (9th Cir. 1975); *Wyoming Outdoor Coord. Council v. Butz,* 484 F. 2d 1244 (10th Cir. 1973).

The CEQ has adopted the unitary test for determining the applicability of NEPA to federal actions. 40 C. F. R. § 1500.6(a) (1978). And see, 40 C. F. R. § 1508.18 (1979), 43 Fed. Reg. 55989 (November 29, 1978). Additionally, the Corps' regulations, in force at the time this permit was issued recognized the unitary test. 33 C. F. R. § 325.4(b)(1) (1978). See also the Corps' definition of minor action at 33 C. F. R. § 209.410(d)(2)(ii) (1978).

Some courts of appeal have bifurcated the statutory phrase and look to see if an action is "federal" and if it is "major" before looking to see if it will "significantly" affect the environment. *Henly v. Mitchell,* 460 F. 2d 640 (2nd Cir. 1972); *N. A. A. C. P. v. Medical Ctr., Inc.,* 585 F. 2d 619 (3rd Cir. 1978); *Save The Bay, Inc., v. Corps of Eng.,* — F. 2d — (5th Cir. 1980); *Scherr v. Volpe,* 466 F. 2d 1027 (7th Cir. 1972).

In this case, the Corps defined "proposed action" to refer only to its issuance of a section 10 permit allowing the power line to cross the river. The Tribe seeks to have this Court delimit "proposed action" by the underlying activity being regulated.

The Corps first narrowed its review of this project to 2% of the 66-mile powerline. The panel which decided this case looked at federal involvement in the unconsidered 98% of the line, concluded there was none and therefore concluded that there was no "major Federal action" and consequently no obligation to review the environmental impacts of the entire line. The Tribe contends that this single project has been federalized in its entirety by the issuance of the section 10 permit and therefore the Corps was obligated to look at the entire line from substation to substation.

The Court's holding is directly contrary to the *en banc* Eighth Circuit holding in *MPIRG I, supra,* the holding of other circuit courts of appeal, the CEQ guidelines, and the Corps' own regulations. The focus should have been on whether the Tribe raised a substantial environmental issue significantly affecting the quality of the human environment concerning the entire line. When the Tribe did so, the issuance of the permit became per se major federal action. *MPIRG I, supra; Sierra Club v. Morton,* 400 F. Supp. 610, 644-645 (N. D. Calif. 1975). It is on this precise point that the conflict amongst the circuits turns.

In effect, the Corps has limited its environmental obligations under NEPA to the physical boundaries of its substantive jurisdiction, essentially the 2% of the powerline extending between the Missouri's banks. The Eighth Circuit panel agreed with this and defined the Corps environmental review responsibility co-terminally with that agency's jurisdictional grant in 33 U. S. C. § 403 (section 10). Also see *United States v. Sexton Cove Estates, Inc.,* 526 F. 2d 1293 (5th Cir. 1976).

In essence then, NEPA's scope is limited by this ruling to the effects of the licensor regardless of the effect of the activities of the licensee permitted by the agency action.

It is the Tribe's position that "major Federal action" must be judged by the activity permitted by the granting of a license or permit. The focus of the Corps in this case should have been upon whether the entire 66 mile powerline substantially affects the quality of the human environment. If it does, then the issuance of the permit making that construction possible is per se major federal action. *MPIRG I, supra*; *Davis v. Morton,* 469 F. 2d 593 (10th Cir. 1972); *Sierra Club v. Morton,* 400 F. Supp. 610, 644-645 (N. D. Cal. 1975).

The inadequacy of the Corps' assessment is clear. It artificially segmented a 66-mile powerline in order to examine 2% of it. It is instructive to examine the three-part test several courts have articulated for defining the scope of an environmental assessment for a highway segment. The segment considered should "at least be independently supportable by meaningful terminal points." *Indian Lookout Alliance v. Volpe,* 484 F. 2d 11, 19 (8th Cir. 1973). The segment should have independent utility. And the segment should be long enough to assure "an adequate opportunity for consideration of the alternatives to the proposed action (both whether and where to build)." *Patterson v. Exon,* 415 F. Supp. 1276, 1282 (D. Neb. 1976). All these criteria are equally appropriate in the transmission line context.

Powerlines have utility for carrying electricity. The electricity can only be used once it reaches a substation.

The only meaningful terminal points for a transmission line are substations. The river bank to river bank environmental assessment provides for no functional review of the line. The line neither begins nor ends at the river's banks. The river crossing segment of the line has no independent utility. See, *Swain v. Brinegar,* 542 F. 2d 364 (7th Cir. 1976) (*en banc*). Alternatives to the river crossing cannot be meaningfully considered unless recognition is given to the underlying activity, which is the construction of a 66-mile powerline. The review conducted by the Corps in this case fails to satisfy any part of this segmentation test. It is very hard to imagine how the Corps could meaningfully consider alternatives without examining the line beyond its river bank to river bank limitation. Presumably, options would be severely limited by the appearance of the ends of the east and west segments of the line, in mid-air, at the points these segments encroached the Corps' jurisdiction. Alternatives cannot be considered, especially the "no action" alternative, when no attention is given to the source of the power, its destination or the effect and method of its transmission.

NEPA requires federal agencies to review the environmental impacts and alternatives to major federal actions significantly affecting the quality of the human environment. This review is to be completed prior to the irretrievable commitment of resources to allow for a meaningful consideration of cost/benefits, alternatives, and mitigation. *Natural Resources Defense Council, Inc. v. Morton,* 488 F. 2d 827 (D. C. Cir. 1972). Under NEPA the scope of review should be "to the fullest extent possible."

To make its examination meaningful, the Corps was obligated to look at the entire Raun-Hoskins line. If the

entire line is looked at, unquestionably the Corps action in permitting the essential step in its construction becomes major Federal action significantly affecting the quality of the human environment. See *Greene County Planning Board v. F.P.C.*, 455 F. 2d 412 (2nd Cir. 1972).

2. The burden of proof imposed upon the Tribe in this case defeats the purpose of NEPA.

As discussed, *supra,* the Corps did not consider 98% of the line. In addition to this failing the Corps totally ignored the effect of the large transmission towers and line upon the Northern American Bald Eagle. There is a substantial population of Bald Eagles in the project area on a seasonal basis. The Bald Eagle is adversely affected by powerlines and power towers.

The Court of Appeals upheld the District Court's holding that the Tribe failed to show that eagles are differently impacted than the robins, ducks, and hawks which were mentioned in the Corps' environmental assessment. But the environmental asssessment did not mention the electrocution hazard which the line poses to Bald Eagles. Further, the loss of one or two robins may be insignificant but the loss of even one Bald Eagle has a significant effect on the quality of the human environment. Bald Eagles are included within the protection of the Endangered Species Act of 1973, 16 U.S.C. §§ 1531-43 (1979), 50 C.F.R. § 17.11 (1978).

The lower courts apparently believe that the Tribe has the burden of establishing that actual injuries will occur to eagles because of this powerline. Although the Tribe believes that it has met this standard, the correct

standard was for the Tribe to demonstrate a deficiency in the administrative record. *Pokorny v. Costle,* 464 F. Supp. 1273 (D. Neb. 1979); *Hiram Clarke Civic Club, Inc., v. Lynn,* 476 F. 2d 421 (5th Cir. 1973); *Hiatt Grain & Feed, Inc. v. Bergland,* 446 F. Supp. 457 (N. D. Ill. 1978). The Tribe has shown three: 98% of the line was completely unconsidered; the Corps gave no consideration to the endangered Bald Eagle; and unconsidered were a number of viable alternatives to the construction of the line.

Once a deficiency in the administrative record has been shown, the burden shifts to the federal agency "which possesses the labor, public resources, and expertise to make the proper environmental assessment and to support it by a preponderance of the evidence." *Pokorny,* at 1276.

To require more of the Tribe would be to insulate the Corps behind an insurmountable barrier. Environmentalists, in bringing NEPA suits, are acting as private attorney generals to preserve our nation's great resources. The cost of experts and research should be borne by the agencies. The Tribe has proven that the Corps did not consider 98% of the proposed action. The Tribe has proven that an endangered species was threatened by the line. The Tribe has proven that viable alternatives were unconsidered. The burden shifted to the Corps to demonstrate the reasonableness of its negative declaration. The Corps did not meet its burden.

3. The scope of the environmental assessment to be made before the United States Army Corps of Engineers issues a permit is a matter of great national importance.

The Corps issues section 10 permits, such as the one at issue in this suit under the authority of section 10 of

the Rivers and Harbors Appropriation Act of March 3, 1899, 33 U. S. C. § 403 (1976). It also issues section 404 permits, combination section 10 and 404 permits, and section 103 permits. The Corps did 16,214 environmental assessments in conjunction with the issuance of permits and letters of permission in fiscal year 1978, ending September 30, 1978. The Corps, in fiscal year 1979, did 15,793 environmental assessments.

Numerous other federal agencies issue permits as well. See *Greene County Planning Board v. Federal Power Commission,* 455 F. 2d 412 (2nd Cir. 1972) (FPC license on high voltage transmission line); *Davis v. Morton,* 469 F. 2d 593 (10th Cir. 1972) (Bureau of Indian Affairs approval of 99 year lease on trust land); *Jette v. Berglund,* 579 F. 2d 59 (10th Cir. 1978) (Department of Agriculture license for drilling); and *State of Maryland v. Train,* 415 F. Supp. 116 (D. Md. 1976) (Environmental Protection Agency ocean dumping permit).

For the above reasons, the Tribe prays that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Eighth Circuit in this case.

Respectfully submitted,

WINNEBAGO TRIBE OF NEBRASKA,
Petitioner

By MICHAEL D. GOOCH
LAWRENCE HAMMERLING

InterTribal Legal Services
Rt. 1, Box 66A
Winnebago, Nebraska 68071

Counsel for Petitioner

APPENDIX A

UNITED STATES COURT OF APPEALS

For the Eighth Circuit

No. 79-1632

WINNEBAGO TRIBE OF NEBRASKA,

Appellant,

vs.

COL. JAMES W. RAY, DISTRICT ENGINEER, OMAHA DISTRICT, UNITED STATES ARMY, CORPS OF ENGINEERS, IOWA PUBLIC SERVICE COMPANY, AND NEBRASKA PUBLIC POWER DISTRICT,

Appellees.

Appeal from the United States District Court for the District of Nebraska.

Submitted: November 7, 1979

Filed: March 13, 1980

Before LAY, Chief Judge;* BRIGHT and McMILLIAN, Circuit Judges.

BRIGHT, Circuit Judge.

Winnebago Tribe of Nebraska (the Tribe) appeals an order of the district court[1] denying its request for a permanent injunction to bar construction of a proposed power line running from Ruan, Iowa, to Hoskins, Ne-

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*The Honorable Donald P. Lay became Chief Judge of the Eighth Circuit on January 1, 1980.

1 The Honorable Albert G. Schatz, United States District Judge for the District of Nebraska.

braska. The Tribe claims the district court erred in holding that the issuance of a permit to cross the Missouri River by the Army Corps of Engineers (Corps) was not a "major federal action" within the meaning of the National Environmental Policy Act of 1969 (NEPA), 42 U. S. C. §§ 4321-61 (1976). The Tribe also maintains that, contrary to the district court's holding, it sustained its burden of proof by raising substantial environmental issues. Finally, the Tribe argues that the Corps' determination not to prepare an environmental impact statement (EIS) was unreasonable. For reasons set forth below, we reject these contentions and affirm the holding of the district court.

I. *Background.*

Appellee Nebraska Public Power District (NPPD) began planning construction of a 345 KV transmission line from Raun, Iowa, to Hoskins, Nebraska, in 1975. The proposed line would cross the Missouri River 150 feet south of an Omaha Public Power District (OPPD) line and run through the Winnebago Indian Reservation. In the fall of 1977, NPPD informed the Tribe and the Bureau of Indian Affairs of its intent.

On July 13, 1978, appellee Iowa Public Service Company (IPS), a joint venturer with NPPD in this project, applied to the Corps for a permit to cross the Missouri River, as required by 33 U. S. C. § 403 (1976) (originally enacted as Rivers and Harbors Appropriation Act of March 3, 1899, ch. 425, § 10, 30 Stat. 1151) (hereinafter section 10). Before granting the permit, the Corps prepared an environmental effect assessment on the impact

of the river-crossing portion of the line (approximately 1.25 miles out of 67 miles). The assessment concluded that an environmental impact statement was not required because "[t]here are no significant environmental impacts associated with this project." The assessment did not mention any possible adverse effect on bald eagles, a protected species.[2] The Corps granted the section 10 permit on January 10, 1979.

On April 30, 1979, the Tribe filed the present suit alleging noncompliance with NEPA and seeking to enjoin construction pending compliance. On May 1, 1979, the district court granted a temporary restraining order. In the course of a three-day trial in May, the court heard testimony on the potential harm to the American bald eagle, a portected species, as well as arguments on the sufficiency and scope of the Corps' assessment. The trial court ruled that the assessment properly considered only the river-crossing portion of the line, because the scope of the federal permit was limited to this area and the federal government was not funding the project. After weighing the evidence on danger to the American bald eagle, the district court concluded that the Tribe had failed to raise a substantial environmental issue. Accordingly, the trial court denied the requested injunctive relief.

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2 *See* Bald Eagle Protection Act, 16 U. S. C. A. §§ 668-668d (1974 & West Supp. 1979); Migratory Bird Treaty Act, 16 U. S. C. A. §§ 703-712 (1974 & West Supp. 1979), 50 C. F. R. § 10.13 (1978); Endangered Species Act of 1973, 16 U. S. C. A. §§ 1531-43 (1974 & West Supp. 1979), 50 C. F. R. § 17.11 (1978).

II. *Analysis.*

Section 102(2)(C) of NEPA, 42 U.S.C. § 4322(2)(C) (1976), requires that the relevant federal agency prepare an EIS for "major federal actions significantly affecting the quality of the human environment." Initially, the agency determines whether the proposed action triggers the EIS requirement. *See Minnesota Public Interest Research Group v. Butz,* 498 F. 2d 1314, 1319-20 (8th Cir. 1974) (*en banc*) (*MPIRG I*). In *MPIRG I, supra,* this court set forth the standard for judicial review of an agency's threshold determination not to prepare an EIS:

> To upset an agency determination not to prepare an impact statement, it still must be shown that the agency's determination was not reasonable under the circumstances. This will require a showing that the project could significantly affect the quality of the human environment. Save Our Ten Acres v. Kreger, [472 F. 2d 463, 466 (5th Cir. 1973)]. We therefore hold that review of an agency's determination not to prepare an impact statement should be measured by its reasonableness in the circumstances, not as to whether it was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. [*MPIRG I, supra,* 498 F. 2d at 1320 (footnote omitted); *accord, Monarch Chemical Works, Inc. v. Thone,* 604 F. 2d 1083, 1087-88 (8th Cir. 1979).]

MPIRG I, in requiring that the plaintiff must show "that the project could significantly affect the quality of the human environment," relied upon *Save Our Ten Acres v. Kreger,* 472 F. 2d 463, 466 (5th Cir. 1973) (*SOTA*). In *SOTA* and subsequent cases, the Fifth Circuit elaborated upon the required showing by allocating burdens of proof: the plaintiff must raise a substantial environmental issue concerning the proposed project, and

then the burden shifts to the defendant to support the reasonableness of the negative determination. *See SOTA, supra,* 472 F. 2d at 467; *Hiram Clarke Civic Club, Inc. v. Lynn,* 476 F. 2d 421, 425 (5th Cir. 1973); *Image of Greater San Antonio, Texas v. Brown,* 570 F. 2d 517, 522 (5th Cir. 1978).

In the present suit, the district court assigned appellant the burden of raising a substantial environmental issue. The parties to the present appeal do not take issue with the district court's use of this approach, nor do we find the method inappropriate. A number of district courts throughout the country have employed this analysis. *See Pokorny v. Costle,* 464 F. Supp. 1273 (D. Neb. 1979); *Hiatt Grain & Feed, Inc. v. Bergland,* 446 F. Supp. 457 (D. Kan. 1978), *aff'd* 602 F. 2d 929 (10th Cir. 1979); *Mid-Shiawassee County Concerned Citizens v. Train,* 408 F. Supp. 650 (E. D. Mich. 1976), *aff'd mem.,* 559 F. 2d 1220 (6th Cir. 1977); *Jones v. HUD,* 390 F. Supp. 579 (E. D. La. 1974). Indeed, without commenting on the district court's characterization of the burden of proof, this court has affirmed an opinion that concluded that many of the plaintiff's claims failed to raise a substantial environmental issue. *Monarch Chemical Works, Inc. v. Exon,* 466 F. Supp. 639 (D. Neb.), *aff'd sub nom. Monarch Chemical Works, Inc. v. Thone,* 604 F. 2d 1083 (8th Cir. 1979). Accordingly, we must determine whether the district court erred in holding that the Tribe failed to meet its burden.

To establish a substantial environmental issue, the "[p]laintiff must allege facts [omitted from consideration in the administrative record] which, if true, would constitute a 'substantial' impact upon the environment." *Hiatt*

Grain & Feed, Inc. v. Bergland, supra, 446 F. Supp. at 490 (citations omitted). The alleged deficiency must be of sufficient significance to warrant shifting the burden of proof. *See Monarch Chemical Works, Inc. v. Exon, supra,* 466 F. Supp. at 647-48; *Pokorny v. Costle, supra,* 464 F. Supp. at 1275-77.

The Tribe claims that the administrative record is deficient in three respects: (1) it ignores sixty-five miles of the sixty-seven mile transmission line; (2) it does not consider certain viable alternatives; and (3) it does not contemplate potential harm to bald eagles. We deal with these claims in the order presented.

A. *Failure to consider the Entire Project.*

The Tribe alleges that the administrative record should have considered environmental impacts posed by the entire transmission line, rather than just the river-crossing portion. Appellant's claim presents two related issues: (a) whether the Corps wields such control and responsibility over the entire project that nonfederal segments must be included in the assessment; and (b) assuming limited federal involvement, whether the Corps nevertheless must consider the impacts of nonfederal segments as secondary effects of the proposed action.

The Tribe notes initially that the powerline will not be constructed without the section 10 permit. In light of "but for" veto power, the Tribe argues, the Corps wields sufficient control over the entire project to require project-wide environmental analysis. Factual or veto control, however, must be distinguished from legal control or "enablement." *See NAACP v. Medical Center, Inc.,* 584 F. 2d 619 (3d Cir. 1978) (*Medical Center*);

Atlanta Coalition on the Transportation Crisis, Inc. v. Atlanta Regional Commission, 599 F. 2d 1333 (5th Cir. 1979) (*Atlanta Coalition*).

In "enablement" cases federal action is a legal condition precedent to accomplishment of an entire non-federal project. *Medical Center, supra,* 584 F. 2d at 632-33; *Atlanta Coalition, supra,* 599 F. 2d at 1345-47. Thus, for example, the federal statute at issue in *Greene County Planning Board v. FPC,* 455 F. 2d 412 (2d Cir.), *cert. denied,* 409 U. S. 849 (1972), required the Federal Power Commission to assure that the entire project was "best adapted" to a comprehensive environmental plan before licensing construction of a powerline. *See also Cady v. Morton,* 527 F. 2d 786 (9th Cir. 1975) (the federal grant of Indian coal leases was the legal condition precedent for the strip mining project); *Davis v. Morton,* 469 F. 2d 593 (10th Cir. 1972) (ninety-nine year lease of Indian lands was legal condition precedent to entire development project). The statute at issue in this case is far narrower and cannot be construed as a grant of legal control over the entire project.[3]

The court in *Medical Center, supra,* identified three factors helpful in determining whether "but for" or fac-

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3 Section 10 does not contain the type of broad mandate present in the Federal Power Commission Act. *Compare Greene County Planning Board v. FPC, supra,* 455 F. 2d at 423. The Corps' jurisdiction under section 10 governs non-federal actions only to the extent they "affect the course, condition, capacity or location of [navigable waters] * * *." *United States v. Sexton Cove Estates, Inc.,* 526 F. 2d 1293, 1299 (5th Cir. 1976). *See Weiszmann v. District Engineer, United States Army Corps of Engineers,* 526 F. 2d 1302, 1304 (5th Cir. 1976); *United States v. Joseph G. Moretti, Inc.,* 525 F. 2d 1306 (5th Cir. 1976).

tual control requires project-wide analysis: (1) the degree of discretion exercised by the agency over the federal portion of the project; (2) whether the federal government has given any direct financial aid to the project; and (3) whether "the overall federal involvement with the project [is] sufficient to turn essentially private action into federal action." *Id.* at 629 (citation omitted). In *Medical Center*, the agency had little or no discretion, there was no direct federal aid, and the court found the federal involvement insufficient.

In the present suit, while the Corps has broad discretion to consider environmental impacts (*see Zable v. Tabb*, 430 F. 2d 199 (5th Cir. 1970), *cert. denied*, 401 U. S. 910 (1971)), that discretion must be exercised within the scope of the agency's authority. As noted above, the Corps' jurisdiction under section 10 extends only to areas in and affecting navigable waters. *See United States v. Sexton Cove Estates, Inc.*, 526 F. 2d 1293, 1299 (5th Cir. 1976); *Weiszmann v. District Engineer, United States Army Corps of Engineers*, 526 F. 2d 1302, 1304 (5th Cir. 1976); *United States v. Joseph G. Moretti, Inc.*, 526 F. 2d 1306 (5th Cir. 1976). As the Third Circuit observed in *United States v. Stoeco Homes, Inc.*, 498 F. 2d 597, 607 (3d Cir. 1974):

> The federal environmental protection statutes did not * * * by their terms enlarge the jurisdiction of the Army Corps of Engineers under the Rivers and Harbors Appropriation Act of 1899. If there is no such jurisdiction environmental protection is still a matter primarily of state concern.

Thus, the Corps' discretion under section 10 does not dictate project-wide review.[4]

The factors remaining for consideration under *Medical Center* are the presence of direct federal funding and the degree of federal involvement. There has been no direct or even indirect federal funding for this project. *Cf. Ely v. Velde*, 451 F. 2d 1130 (4th Cir. 1971) (Law Enforcement Assistance Administration involvement in and funding for a state prison amounts to major federal action). As for federal involvement, the fact that part of the line will cross the Winnebago Reservation does not suffice to turn this essentially private action into federal action.[5] Federal law allows the state to condemn this land for any public purpose in the same manner as land owned in fee. 25 U. S. C. § 357 (1976). Thus, we conclude that the Corps did not have sufficient control and responsibility to require it to study the entire project.

The Tribe also notes that an agency must consider secondary or indirect impacts in determining whether

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4 Contrary to the Tribe's claim, the Corps' amended regulations do not appear to make the grant of a section 10 permit a *per se* major federal action. *See* 44 Fed. Reg. 38,292, 38,294, 38,307-12 (1979) (to be codified in 33 C. F. R. § 230.6 (e) and Appendix B to 33 C. F. R. § 230). Moreover, new Council on Environmental Quality regulations, 43 Fed. Reg. 55,978 (1978) (to be codified in 40 C. F. R. §§ 1500-08), as well as amended Corps of Engineers regulations, 44 Fed. Reg. 38,292 (1979) (to be codified in 33 C. F. R. § 230), postdate the assessment here and do not apply. *See* 43 Fed. Reg. 56,002 (1978) (to be codified in 40 C. F. R. § 1506.12).

5 *Cf. Citizens Committee for the Hudson Valley v. Volpe*, 425 F. 2d 97, 106 (2d Cir.), *cert. denied*, 400 U. S. 949 (1970) (Corps required to prepare project-wide EIS now because both Congress and the Secretary of Transportation later will have to approve other portions of the state expressway project).

there are any significant impacts upon the environment. *See* 40 C. F. R. § 1500.6(b) (1978). Appellant argues that the administrative record does not reflect consideration of a secondary effect of granting the permit—namely, building the remainder of the line. If, however, appellant's position were correct, then an EIS for a properly segmented portion of highway would have to consider impacts of subsequent segments as well. A careful reading of the Council on Environmental Quality Guidelines, 40 C. F. R. § 1500.8(a)(3)(ii) (1978),[6] leads us to reject appellant's contention as erroneous. Completion of the nonfederal aspects of this single project does not constitute a secondary or indirect effect of the federal action.

B. *Alternatives.*

Appellant's second alleged deficiency in the administrative record is the absence of certain alternatives;[7]

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6 40 C. F. R. § 1500.8 (a) (3) (ii) provides in part:

> (ii) Secondary or indirect, as well as primary or direct, consequences for the environment should be included in the analysis. Many major Federal actions, in particular those that involve the construction or licensing of infrastructure investments (e. g., highways, airports, sewer systems, water resource projects, etc.), stimulate or induce secondary effects in the form of associated investments and changed patterns of social and economic activities. Such secondary effects, through their impacts on existing community facilities and activties, through inducing new facilities and activities, or through changes in natural conditions, may often be even more substantial than the primary effects of the original action itself. For example, the effects of the proposed action on population and growth may be among the more significant secondary effects.

7 The environmental assessment did consider three alternatives, including the no action option.

however, the Tribe did not allege this failure in its complaint, nor did the district court consider the claim in its memorandum opinion.[8] Because appellant failed to raise this issue to the trial court, we will not consider it as a basis for reversal. *See Morrow v. Greyhound Lines, Inc.*, 541 F. 2d 713, 724 (8th Cir. 1976), and cases cited therein. Furthermore, we conclude that our refusal to consider the issue would not result in "a plain miscarriage of justice," nor is it "inconsistent with substantial justice." Id.

C. *Potential Harm to Eagles.*

Finally, the Tribe claims it raised a substantial environmental issue concerning possible harm to bald eagles. The trial court summarized the evidence regarding eagles as follows:

> [F]irst, the Corps considered several different varities of birds in evaluating the area and concluded that there would be only short-term impacts resulting from the actual construction of the project, though some terrestrial habitats would be disturbed. Second, the Corps did not specifically consider the American bald eagle in its evaluation. Third, some eagles have been sighted in the area but there is no evidence that they nest in the area. Fourth, a small number[9] of eagles are electrocuted each year throughout the United States.

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8 At trial, the only discussion of other alternatives arose in response to the following question, posed by the Tribe's counsel: "[H]as the District, since this litigation began, considered any alternatives to solving this shortage if this line cant' be built?"

9 Dr. Louis Locke, a wildlife pathologist for the U. S. Fish and Wildlife Service, testified that approximately six percent of eagles necropsied between 1975 and 1977 had died of electrocution.

The trial court noted that there was no evidence establishing either that high powerlines affect eagles differently than the species of birds considered in the assessment, or that the existing OPPD powerline has detrimentally affected the bald eagles in the area. We hold that on the basis of this eviednce the trial court did not err in concluding that the Tribe failed to establish a significant environmental impact on eagles.

III. *Conclusion.*

The Tribe has failed to meet its burden of raising a substantial environmental issue omitted from consideration in the administrative record. Accordingly, we affirm the order of the trial court denying a permanent injunction.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS
EIGHTH CIRCUIT.

APPENDIX B

MEMORANDUM OPINION

(Filed June 28, 1979.)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

Civ. 79-0-158

WINNEBAGO TRIBE OF NEBRASKA,

Plaintiff,

vs.

COL. JAMES W. RAY, District Engineer, et al.,

Defendants.

This matter is before the Court in regard to the plaintiff's request for a permanent injunction. A temporary restraining order was issued on May 1, 1979. This Court, by agreement of the parties, proceeded on May 21, 1979, with a trial on the merits of the permanent injunction, at which time evidence and arguments were presented. The following memorandum constitutes the Court's findings of fact and conclusions of law in accordance with Rule 52 (a), Federal Rules of Civil Procedure.

The plaintiff, Winnebago Indian Tribe, seeks to halt the construction of a sixty-seven mile 345 KV transmission line which is proposed to run from the Iowa Public Service Company Raun substation in Iowa to Hoskins, Nebraska. The plaintiff has brought this action for alleged breach of the National Environmental Policy Act, 42 U. S. C. § 4321, *et seq.* (hereinafter NEPA). This Court has jurisdiction pursuant to 28 U. S. C. §§ 1331 (a), 1361,

1362, 2201 and 2202. Nebraska Public Power District (hereinafter NPPD), Iowa Public Service Company (hereinafter IPS), and the United States Army Corps of Engineers (hereinafter the Corps) have been named as defendants. The plaintiff has alleged that the environmental assessment performed by the Corps was insufficient in that the Corps failed to assess the environmental impact of this project upon American bald eagles and wrongfully limited its review to the river crossing segment rather than evaluating the impact upon the entire sixty-seven miles of the proposed line.

The two power companies agreed to share the cost of construction in the following manner: IPS financed and constructed the segment from the Raun substation crossing the Missouri River and ending on the west bank. NPPD is responsible for the financing and construction from the west bank to Hoskins, Nebraska, the major portion of the project. This proposed power line crosses the Missouri one hundred fifty feet south of another 345 KV transmission line owned by the Omaha Public Power District. The two lines run parallel for approximately three and one half miles. Since the span across the river was the obligation of IPS, it was incumbent upon them to acquire the necessary permits from the Corps.

In order to cross the Missouri, IPS sought a permit pursuant to Section 10 of the Rivers and Harbors Appropriation Act of 1899, 33 U. S. C. § 403. As mandated by NEPA, the Corps conducted an environmental review to ascertain the impact of the proposed construction on all aspects of the quality of the environment. IPS submitted environmental data to the Corps and upon this data

and an independent review, the Corps concluded that there were no significant environmental effects requiring an environmental impact statement (hereinafter EIS). A negative declaration to that effect was issued supported by an environmental effects assessment which briefly described the proposed construction, the probable environmental consequences, feasible alternatives and an explanation of the Corps' conclusion. The Corps did not specifically mention the presence of endangered species of birds such as the American bald eagle. In addition, the Corps' assessment was limited to a discussion of the environmental effects of the river crossing, but did not consider the remaining portion of the proposed line.

As stated above, the plaintiff has made two challenges to the "negative declaration" issued by the Corps. The plaintiff alleges that the Corps failed to evaluate the entire construction project and instead wrongfully narrowed their focus to the river crossing segment; secondly, the plaintiff alleges that the Corps failed to consider the environmental impact upon the American bald eagle, an endangered species.

A threshold issue is whether this privately financed and engineered project constitutes a major federal action. *Scientists' Institute for Public Information, Inc. v. Atomic Energy Commission,* 156 U. S. App. D. C. 395, 481 F. 2d 1079, 1088 (1973) expanded upon the phrase "major federal action" based upon a review of the legislative history and concluded as follows:

> Thus, there is "Federal action" within the meaning of the statute not only when an agency proposes to build a facility itself, but also whenever an agency makes a decision which permits action by other

> parties which will effect the quality of the environment. NEPA's impact statement procedure has been held to apply where a federal agency approves a lease of land to private parties, grants licenses and permits to private parties, or approves and funds state highway projects. (Footnotes omitted.)

Where Courts have construed the granting of a license for a permit to be "federal action," such permits have concerned an entire project and/or the foundational facets of a project. *See, e.g., Greenc County Planning Board v. F.P.C.,* 455 F.2d 412 (2d Cir.), *cert. denied,* 409 U.S. 849 (1972) (wherein an FPC permit concerned all aspects of the construction of hydroelectric transmitters and the generation of power therefrom.); *Calvert Cliffs' Coordinating Committee v. U.S.A.E.C.,* 146 U.S.App.D.C. 33, 449 F.2d 1109 (1971) (wherein atomic energy licensing and operating permits were in question). In cases where an agency has a lesser involvement, federal funding is necessary to bolster the federal nature of an action. As an example, in *Dalsis v. Hills,* 424 F.Supp. 784 (W.D. N.Y. 1976), a court considered whether the construction of an enclosed shopping mall constituted "major federal action." The court stated:

> A major federal action includes a decision of a federal agency which permits action to be undertaken by private parties which will effect the quality of the environment. (Citations omitted.) In the case at hand, HUD gave its approval with knowledge that a private developer would build the mall. This decision, *together with the funding* of the initial demolition of the substandard buildings, was sufficient to satisfy NEPA's "major federal action" prerequisite. (Emphasis supplied.) 424 F.Supp. at 787.

This analysis is in accord with the guidelines promulgated by the Counsel on Environmental Quality to aid federal

agencies with respect to their responsibilities under NEPA. At 40 C. F. R. 1500.6 (c), the guidelines provide:

> The action causing the impact must also be one where there is sufficient Federal control and responsibility to constitute "Federal action" in contrast to cases where such Federal control and responsibility are not present, as for example, where Federal funds are distributed in the form of general revenue sharing to be used by State and local governments (*see* Section 1500.5 (ii)).

In the instant case there is no federal funding for any aspect of the project and the permit issued by the Corps of Engineers concerns a technically minor aspect of the project when viewed in toto. It is true that the denial of a Section 10 permit would foreclose the project entirely because the two state power companies seek to link their operations and must, by necessity cross the Missouri River at some point. However, the Section 10 permit does not concern the nature of the project as a whole or the technical essence of the project. The plaintiff's assertion that this project is a "major federal action" in unfounded.

The fact that the project is not a "federal action" does not denegrate the responsibility of the Corps to determine whether an EIS must be performed in regard to the Section 10 permit. As stated above, the Corps issued a negative declaration stating that an EIS was unnecessary in regard to this particular Section 10 permit. The principles of judicial review in cases concerning a "negative declaration" by an administrative agency have been clearly and concisely set forth in *Pokorny v. Costle,* 464 F. Supp. 1273 (D. Neb. 1979), but bear repeating here. First, administrative agencies are responsible for the initial determination of whether an EIS is required under

NEPA. *Minnesota Public Interest Research Group v. Butz,* 498 F. 2d 1314, 1319 (8th Cir. 1974). Within the Eighth Circuit, the standard of judicial review for this determination is "one of reasonableness." *Minnesota Public Interest Research Group, supra; Monarch Chemical Works, Inc. v. Exon,* 452 F. Supp. 493, 500 (D. Neb. 1978); *Patterson v. Exon,* 415 F. Supp. 1276, 1281 (D. Neb. 1976). The burden of proof in cases challenging an agency's declaration is initially placed upon the plaintiff to demonstrate the deficiency in the administrative record exists. *Hiram Clarke Civic Club, Inc. v. Lynn,* 476 F. 2d 421, 425 (5th Cir. 1973); *Hiatt Grain and Feed, Inc. v. Bergland,* 446 F. Supp. 457, 490 (N. D. Ill. 1978).

The Court's inquiry is not limited to the allegedly deficient administrative record. After the plaintiff has demonstrated that an incomplete administrative record exists, the Court may consider extrinsic evidence in its evaluation of the reasonableness of a "negative declaration." In *Hiram,* the court stated:

> Rather, as we said in SOTA (Save Our Ten Acres v. Kreger, 472 F. 2d 463 (5th Cir. 1973)) only if a plaintiff raises substantial environmental issues should a court proceed to examine and weigh the evidence of both the plaintiff and the agency to determine whether the agency reasonably concluded that the particular project would have no effects that would significantly affect our environmental quality. Only if the plaintiff can show an inadequate evidentiary development before the agency should the District Court supplement the deficient administrative record by taking evidence on the environmental impact of the project. 476 F. 2d at 425.

The evidence presented at trial established that American bald eagles do frequent and roost in the area sur-

rounding the banks of the Missouri River, where the proposed Raun-Hoskins transmission line will cross, during the water fowl migratory periods of late fall and early spring. These birds nest in more northern areas of Minnesota and fly south during the harshest months of the winter. They feed on a variety of small animals and fish. Persons living in the area testified that they had sighted between fifty and eighty eagles during one season. Mark Haindfield, a park ranger for the past seven years at the Snyder Bend County Park near the area where the transmission lines cross the Missouri, stated that he had never observed any evidence of dead bald eagles in the area of the existing OPPD power lines and concluded that the additional construction would not propose any additional threats.

Doctor Louis Locke, a wildlife pathologist for the U. S. Fish and Wildlife Service, testified that he had performed or supervised the necropsy[1] of over three hundred bald eagles between 1963 and the present. Specimens of dead bald eagles are submitted to Doctor Locke's laboratories by special agents of the Fish and Wildlife Service whenever such specimens are found. In large part, the pathologists seek to define the cause of death for possible prosecution under the Bald Eagle Act. Of the birds necropsied between 1975 and 1977, Doctor Locke testified that approximately six per cent (ten eagles) were electrocuted, though he did not recall where in the country or how these accidents had occurred.

A threshold requirement in this Court's review of the issues presented here is whether the plaintiff has

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1 A necropsy is a post-mortem examination.

raised a "substantial environmental issue," *Hiram Clarke Civic Club, supra,* at 425. The plaintiff established four matters: first, the Corps considered several different varieties of birds in evaluating the area and concluded that there would be only short-term impacts resulting from the actual construction of the project, though some terrestrial habits would be disturbed. Second, the Corps did not specifically consider the American bald eagle in its evaluation. Third, some eagles have been sighted in the area but there is no evidence that they nest in the area. Fourth, a small number of eagles are electrocuted each year throughout the United States.

There has been no evidence concerning several issues crucial to this complaint. There has been no evidence that the area has been or will be designated as a critical habitat for the American bald eagle. There is no evidence that the American bald eagle is affected by the presence of high power lines in a manner different from other species of birds which were considered by the Corps. There has been no evidence concerning the manner in which birds are electrocuted by high power lines and whether such electrocutions normally occur in nesting areas or in roosting areas. In contrast, there has been credible evidence that the existing Omaha Public Power District line has not detrimentally affected the eagles roosting in the area to date.

In light of these critical omissions, this Court finds that the plaintiff has failed to present a substantial environmental issue requiring a reevaluation of a Section 10 permit by the Corps of Engineers. Accordingly, a separate order denying plaintiff's request for a perma-

nent injunction has previously been entered in conformity with this memorandum opinion.

By the Court:

/s/ Albert G. Schatz

Judge, United States District Court

Supreme Court, U. S.
FILED
AUG 26 1980
MICHAEL RODAK, JR., CLERK

No. 79-1948

In the Supreme Court of the United States

OCTOBER TERM, 1979

WINNEBAGO TRIBE OF NEBRASKA, PETITIONER

v.

COL. JAMES W. RAY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General

JAMES W. MOORMAN
Assistant Attorney General

ROBERT L. KLARQUIST
THOMAS H. PACHECO
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

QUESTIONS PRESENTED

1. Whether the Army Corps of Engineers violated the National Environmental Policy Act by limiting its consideration of the impact of a power line to the river-crossing area only, where the sole federal involvement in the project was the Corps' issuance of a permit to the power company to construct a portion of the line over that navigable waterway.

2. Whether petitioner carried its burden of raising a significant environmental issue concerning the effect of the river-crossing portion of the power line on bald eagles.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-12) is reported at 621 F. 2d 269. The opinion of the district court (Pet. App. 13-21) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 13, 1980. The petition for a writ of certiorari was filed on June 11, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1975, the Nebraska Public Power District (NPPD) and the Iowa Public Service Company (IPS) undertook a project to build a 67-mile power transmission line from the IPS Raun Substation in Iowa to an NPPD substation near Hoskins, Nebraska. On January 10, 1979, the Army Corps of Engineers issued a permit to IPS to construct the line across the Missouri River approximately 150 feet south of a similar power line owned by the Omaha Public Power District.[1] Prior to granting the permit, the Corps determined, based on an Environmental Effect Assessment,[2] that an Environmental Impact

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[1]Under Section 10 of the Rivers and Harbors Appropriation Act of 1899, ch. 425, 30 Stat. 1151, 33 U.S.C. 403, a permit is required in order to build a structure, such as the transmission line at issue here, over navigable waters. See 33 C.F.R. 322.5(i) (1978). IPS applied for the permit because it was responsible for constructing the river-crossing part of the line. The line was planned to begin in Iowa, cross the river, and run most of its distance through Nebraska.

[2]Under Corps regulations in effect at the time the permit was issued, the District Engineer could issue a declaration that no EIS was necessary if he determined on the basis of an Environmental Effect Assessment that a proposed action would not have a significant impact on the quality of the human environment. See 33 C.F.R. 209.410(d)(2)(ii), 325.2(a)(4) (1978). See also 33 C.F.R. 209.410, 320.3(d), 325.4 (1978).

Statement (EIS) was not required under the National Environmental Policy Act (NEPA), 42 U.S.C. 4321 *et seq.* (Pet. App. 2-3, 13-15).

The Environmental Effect Assessment issued by the Corps (Pl. Exh. 6) considered the impact of the 1.25-mile portion of the power line that crossed the river. The Assessment described the proposed construction and maintenance of two steel towers connected across the river by transmission wires, the probable environmental consequences, any feasible alternatives, and the basis for the conclusion that no significant environmental impact would result. Although American bald eagles were not specifically mentioned, the Assessment noted, among other things, that the proposed project was not expected to have a long-term detrimental effect on the wildlife in the area, including several species of birds (Pl. Exh. 6 at 1-2). The Assessment concluded that an EIS was not required because no significant environmental impact was associated with the river-crossing project (Pet. App. 2-3, 14-15).

2. On April 30, 1979, petitioner brought the present action in the United States District Court for the District of Nebraska, contending that the Corps violated Section 102(2)(C) of NEPA (42 U.S.C. 4332(2)(C)) when it issued the permit to IPS without preparing an EIS. In particular, petitioner claimed that the Corps should have prepared an EIS on the entire 67-mile span of the line rather than limiting its consideration to the river-crossing area only, and that the Corps' Environmental Effect Assessment was inadequate because it did not assess the impact of the line on the bald eagle. Petitioner sought to enjoin NPPD and IPS from constructing the line and condemning land in connection with the project (Pet. App. 3, 13-14, 15).

Following a three-day trial, the district court concluded that the Corps had acted reasonably in issuing the permit

without preparing an EIS (Pet. App. 13-21). The court of appeals affirmed (*id.* at 1-12).

ARGUMENT

1. Several considerations suggest that this case is not of sufficient continuing importance to warrant review by this Court. First, in holding that the construction of the entire line was not a secondary or indirect effect of the permit, the court of appeals relied (Pet. App. 10) on guidelines issued by the Council on Environmental Quality (CEQ). See 40 C.F.R. Part 1500 (1978). These guidelines have now been superseded by binding regulations. See 40 C.F.R. Part 1500 (1979); *Andrus* v. *Sierra Club*, 442 U.S. 347, 357 & n.16 (1979). Since CEQ's regulations are entitled to "substantial deference' in interpreting NEPA (*id.* at 358), this change renders the decision below of limited precedential value.

Moreover, with respect to petitioner's assertion that the administrative record is inadequate because of the failure specifically to consider the bald eagle (Pet. 15-16), the Corps has now prepared an Addendum to Findings of Fact (App. A, *infra*), and an Environmental Effects Assessment Supplement (App. B, *infra*) to evaluate the effect on the bald eagle of the river-crossing project.[3] Based on this review, the Corps has determined that there will be no significant effect on the species. Cf. *Warm Springs Dam Task Force* v. *Gribble*, 621 F. 2d 1017, 1025-1026 (9th Cir. 1980).[4]

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[3]This Supplement was prepared pursuant to Section 7 of the Endangered Species Act, 16 U.S.C. (Supp. II) 1536(a)-(d).

[4]We also note that the river-crossing portion of the power line has now been completed. Condemnation proceedings to acquire the right of way for the line are underway. See *Nebraska Public Power District* v. *100.95 Acres of Land, Etc.*, Civ. No. 79-0-411 (D. Neb. filed Sept. 12, 1979).

2. In any event, the decision below is correct and does not conflict with any decision of this Court or of the other courts of appeals.

a. The court of appeals properly rejected petitioner's claim that the Corps acted unreasonably in limiting its consideration of potential environmental impact to the river-crossing portion of the power line. The requirements of NEPA are to be construed in light of a "rule of reason." See, *e.g., Sierra Club* v. *Froehlke,* 534 F. 2d 1289, 1299 (8th Cir. 1976); *Harlem Valley Transportation Assoc.* v. *Stafford,* 500 F. 2d 328, 337 (2d Cir. 1974); *NRDC* v. *Morton,* 458 F. 2d 827, 837 (D.C. Cir. 1972). Only if it was unreasonable may the Corps' EIS decision be reversed. See, *e.g., Monarch Chemical Works, Inc.* v. *Thone,* 604 F. 2d 1083, 1087-1088 (8th Cir. 1979); *Texas Committee on Natural Resources* v. *Bergland,* 573 F. 2d 201, 206 (5th Cir. 1978); *Minnesota Public Interest Research Group* v. *Butz,* 498 F. 2d 1314, 1320 (8th Cir. 1974) (en banc) (*MPIRG I*). And, in reviewing an agency's determination, "[t]he task of the court is not to decide where to draw the line, but to review the matter to ascertain whether the agency has made a reasonable choice." *Swain* v. *Brinegar,* 542 F. 2d 364, 369 (7th Cir. 1976). See also *Kleppe* v. *Sierra Club,* 427 U.S. 390, 410 n.21 (1976).[5]

In view of the " 'federal action' being taken" here (*Kleppe* v. *Sierra Club, supra,* 427 U.S. at 402 n.14, quoting *Aberdeen & Rockfish R. Co.* v. *SCRAP,* 422

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[5]While NEPA establishes significant substantive goals for the Nation, the duties it imposes upon agencies are "essentially precedural." *Stryckers Bay Neighborhood Council* v. *Karlen,* No. 79-168 (Jan. 7, 1980), slip op. 4-5; *Vermont Yankee Nuclear Power Corp.* v. *NRDC,* 435 U.S. 519, 558 (1978). Here, petitioners have not shown that the procedural requirements of NEPA were not met.

U.S. 289, 322 (1975)), the court of appeals correctly upheld the reasonableness of the Corps' decision to consider only the river-crossing portion of the power line.[6] The power-line project is a joint venture between two public utilities, with no federal financing or other participation. The sole federal involvement in this project is the Section 10 permit to cross the river.[7] Under the now-superseded CEQ guidelines, this limited degree of federal involvement supported the Corps' determination concerning the geographic scope of the environmental

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[6]We also note that NPDD, although not required to do so, had prepared an environmental assessment for the proposed line (Def. Exh. 109). This assessment was made available to the public and was delivered to the offices of the Bureau of Indian Affairs in Winnebago and to petitioner's tribal council. At trial, petitioner failed to show that the 67-mile power-line project, even considered in its entirety, could significantly affect the quality of the environment. See *MPIRG I, supra,* 498 F. 2d at 1320.

[7]For this reason, the "highway segmentation" cases such as *Indian Lookout Alliance* v. *Volpe,* 484 F. 2d 11 (8th Cir. 1973), on which petitioner relies (Pet. 13-14), are inapposite. In those cases, it was alleged that federally-funded projects were "segmented" rather than considered in their entirety, thereby preventing meaningful NEPA review of the "federal action." No comparable situation is presented here.

Nor is this case analogous to *Greene County Planning Board* v. *FPC,* 455 F. 2d 412 (2d Cir.), cert. denied, 409 U.S. 849 (1972), and similar decisions cited by petitioner (Pet. 15, 17). A federal agency may be required to assess the impact of a project as a whole when it issues a permit for the complete project or otherwise associates itself with the entirety of the project in a substantial way. Here, however, the Section 10 permit was not necessary to the construction of the power line and was only an incidental aspect of the project in order to allow the line to cross the river.

Finally, insofar as petitioner relies (Pet. 10-15) on Eighth Circuit cases such as *MPIRG I* to support its contention that the decision below conflicts with other court of appeals decisions, this assertion of an intra-circuit conflict is not a ground for review by this Court. See *Wisniewski* v. *United States,* 353 U.S. 901 (1957).

assessment. In the circumstances of this case, it was proper for the Corps to focus on the impact of the activity it had authorized—the power line's crossing of the navigable river.[8]

b. The courts below also correctly held that petitioner had not shown that the river-crossing portion of the power line could significantly affect the bald eagle. After reviewing the evidence introduced at trial, the district court specifically found (Pet. App. 20) that the existing Omaha Public Power District line had not detrimentally affected bald eagles in the area and that petitioner failed to establish that the proposed NPPD-IPS power line posed a substantial threat to the eagle.[9] The court of appeals sustained this finding "on the basis of [the] evidence" (*id.* at 12). Further review of this fact-bound issue is unwarranted. See, *e.g.*, *Branti* v. *Finkel*, No. 78-1654 (Mar. 31, 1980), slip op. 5 n.6; *Berenyi* v. *Immigration Director*, 385 U.S. 630, 635-636 (1967); *Graver Mfg. Co.* v. *Linde Co.*, 336 U.S. 271, 275 (1949).

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[8]Petitioner also argues (Pet. 14, 16) that the Corps did not adequately consider alternatives to the project. This claim was not raised in the complaint or considered by the district court, however, and the court of appeals correctly concluded (Pet. App. 10-11) that it was therefore not presented for review. See, *e.g.*, *United States* v. *Mitchell*, No. 78-1756 (Apr. 15, 1980), slip op. 11 n.7; *Singleton* v. *Wulff*, 428 U.S. 106, 120 (1976). In any event, the Assessment contains an adequate discussion of three alternatives, including the possibility of no action (Pl. Exh. 6 at 2-3).

[9]This finding was amply supported by the evidence. See, *e.g.*, Trial Tr. 92-94, 97, 102. In addition, as stated above (see note 6, *supra*), NPDD had voluntarily prepared an environmental assessment for the project that revealed no adverse effect on the eagle. And this conclusion is confirmed by the Corps' Environmental Effects Assessment Supplement (see page 3, *supra*).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

JAMES W. MOORMAN
Assistant Attorney General

ROBERT L. KLARQUIST
THOMAS H. PACHECO
Attorneys

AUGUST 1980

DOJ-1980-08

APPENDIX A

ADDENDUM TO FINDINGS OF FACT

for Iowa Public Service Company

IA - NE 2SB OXT 1 001664

Project: Overhead Transmission Line across the Missouri River Mile 718.65C

Applicant: Iowa Public Service Company

Subject: Amend FOF to include facts concerning Threatened or Endangered Species

In order to determine possible impacts to the peregrine falcon and the bald eagle, the Corps solicited comments from the Fish and Wildlife Service regarding the need for a biological assessment pursuant to Section 7(c) of the Endangered Species Act. By letter dated 9 August 1979 the Fish and Wildlife Service stated that they do not believe the project is a major Federal action; and, therefore, a biological assessment is not required. They did state, however, that it is the Corps' responsibility under Section 7(a) of the Act to determine whether or not any endangered species will be affected by this action and that if the Corps determines it "may effect" those species, formal consulation should be initiated. Concluding, the letter stated that the bald eagle and peregrine falcon could occur in the project area (attachment 1). In compliance with Section 7(a) of the Endangered Species Act, a supplement to the Environmental Effects Assessment was prepared which determined that the project does not jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse

modification of habitat to such species (attachment 2). Accordingly, formal consultation with the Fish and Wildlife Service will not be initiated.

_____

date

V. D. Stipo
Colonel, Corps of Engineers
District Engineer

APPENDIX B

DA Permit No. IA-NE 2SB OXT 1 001664
Iowa Public Service Company
Overhead Cable Crossing
Missouri River (Mile 718.65C)

ENVIRONMENTAL EFFECTS ASSESSMENT SUPPLEMENT

In compliance with Section 7(a) of the Endangered Species Act, the following addendum has been prepared for the original Environmental Effects Assessment:

Though a variety of wildlife is found in the project area, only two species, the peregrine falcon and the bald eagle, have ranges that extend to this region. Of these, the peregrine falcon is considered an occasional migrant in the area and is only rarely seen. The bald eagle, however, is a frequent visitor in this reach of the Missouri River floodplain. Bald eagle sightings taken from the Snyder Bend area, approximately 2 miles downstream of the proposed crossing, indicate the birds first appear in late December. During the winter months it is not uncommon for 20-25 eagles to take up residence in this area. The number of eagles usually peaks in mid-March with the annual spring migration. At this time, as many as 80 eagles have been observed at Snyder Bend. There are, however, no known instances of bald eagles nesting at or near this location. Though inclusion of the transmission lines into the present environment would increase the probability of an eagle striking a line resulting in injury or death, the overall impact to the bald eagle population would be insignificant. Furthermore, the proposed lines are situated very close to an existing 345 kV line (mile 718.3) and is located in an area that is predominantly industrialized. As such, use of the immediate area by wintering or migrating eagles would be low. It has also been determined that construction activities would not

affect food resources or winter habitats of the bald eagle. Due to the extremely rare occurrence of the peregrine falcon in this area, this species will not be affected. The project does not, therefore, jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification of habitat of such species. Several mitigative measures can be incorporated into construction design to lessen potential adverse impacts to bald eagles. First, lines on the proposed crossing should be installed at exactly the same elevation as the lines on the existing 345 kV crossing. This would reduce the probability of a bald eagle, or any other avifauna, from colliding with the lines. Secondly, orange or red ball markers should be installed. This would render the lines more detectable to eagles during times when line collissions are likely (i.e. adverse weather conditions such as blizzards or thunderstorms when visibility is reduced).

Prepared by: Michael Freel
Environmental Resources
Specialist

Concur: V. D. Stipo
Colonel, Corps of Engineers
District Engineer

Supreme Court, U.S.
FILED
JUL 14 1980
MICHAEL RODAK, JR., CLERK

79-1948

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1979

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WINNEBAGO TRIBE OF NEBRASKA,
Petitioner,

vs.

COL. JAMES W. RAY, DISTRICT ENGINEER, OMAHA DISTRICT, UNITED STATES ARMY, CORPS OF ENGINEERS, IOWA PUBLIC SERVICE COMPANY, AND NEBRASKA PUBLIC POWER DISTRICT,
Respondents.

---o---

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

---o---

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

---o---

JAMES J. DEMARS
BARLOW, JOHNSON, DEMARS & FLODMAN
P.O. Box 81686
Lincoln, Nebraska 68501
(402) 475-4240
Counsel for Respondents Iowa Public Service Company and Nebraska Public Power District

GANT PUBLISHING COMPANY, 1610 N Street, Lincoln, Nebraska 68508

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Petitioner failed to carry its burden of proof before the District Court.

2. Whether the decision of the District Judge sitting as a finder of fact was so clearly wrong that the decision may be overturned by applicable standards of review.

3. Whether there was a major federal action because of alleged illegal segmentation.

4. Whether any of the reasons set forth in Rule 17 of the Supreme Court of the United States are present to confer a review of this case.

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OPINIONS

These Respondents accept the Opinions attached to Petitioner's Petition For Writ of Certiorari and contained in its Appendix A and Appendix B.

STATEMENT OF THE CASE

Respondent Nebraska Public Power District (hereinafter cited as NPPD) began planning the construction of a 345 KV transmission line to supply power to northwestern Nebraska in 1975. On September 29, 1977, NPPD met with a representative from the Bureau of Indian Affairs (hereinafter cited as BIA). In that contact NPPD described its intentions to construct the transmission line as well as notices for required public meetings, voluntary meetings, and other general terms regarding the line. Sometime in the early part of October, 1977, NPPD made direct contact with a representative from the Winnebago Tribe of Nebraska. Therefore, since October, 1977, both the BIA and the Winnebago Tribe of Nebraska have been fully aware of the intent of NPPD to construct a 345 KV transmission line from Raun, Iowa, to Hoskins, Nebraska.

Public meetings, both voluntary and those required by statute, were held by NPPD in the counties where the transmission line would pass. One of said meetings was held in Winnebago on October 11, 1977. NPPD held this voluntary meeting for the purpose of securing input from the Winnebago Indians as to the route of the line as it would cross the reservation, as well as any other problems the line would present to the Indians themselves. Other meetings were held in other counties for the same purpose of receiving input from the public at large as to any problems the transmission

line would pose to surrounding communities. In December of 1978 and January of 1979, contracts were let and awarded to the contractor for the construction of the transmission line as well as materials needed for said construction.

The proposed transmission line runs from Raun, Iowa to Hoskins, Nebraska. This distance is some 65 miles which includes crossing of the Missouri River. Additionally, this project is a joint venture between NPPD and Iowa Public Service Company (hereinafter called IPS). Because the transmission line crosses the Missouri River, it was decided that IPS would be responsible for building and stringing the transmission line from the Raun, Iowa substation to the west bank of the Missouri River on the Nebraska side. In crossing the river, a permit is required by the River and Harbor Act of 1899, 33 U.S.C. 403. Therefore, IPS compiled the necessary information for appellee United States Army Corps of Engineers (hereinafter called Corps). The application for a permit to cross the Missouri River was filed with the Corps on July 13, 1978. On January 29, 1979 a permit was given to IPS to construct and maintain a 345 KV overhead transmission line over the Missouri River. In the application submitted by IPS was an environmental assessment questionnaire that was filled out by IPS regarding the environmental impact this construction would have on and around the Missouri River crossing site. Noted in that questionnaire, was the existence of a 345 KV transmission line crossing the river approximately 150 feet to the south of the proposed crossing. Construction of the river crossing has been totally completed.

Negotiations for the right of way acquisitions for Thurston County began on or about November 23, 1978.

In Thurston County, where the Winnebago reservation is located, 69 percent of the right of way had been acquired by the time of trial. Right of way costs to date of trial were $1,290,000.00, of which $469,000.00 had been spent in Thurston County. There are 31 or 32 tracts of land on the Winnebago reservation currently under condemnation.

Actual construction of the transmission line began in the area in question on the 26th of February, 1979. The transmission line was to be constructed from the Missouri River west to Hoskins, Nebraska. The reason for the construction to proceed in that direction was due to agricultural production of the area. As of May 1, 1979, NPPD was committed to just slightly over $10,000,000.00. Because of the delay and the costs incurred to reroute the transmission line or move the materials to other locations, the cost of the project has increased by some $2,000,000.00. A complete reroute of the line would require an additional two years to complete the project, but from the evidence brought forth during the trial, the power needs of northeastern Nebraska cannot wait an additional two years to receive the power from this transmission line.

Not until the construction of the power line had reached the borders of the Winnebago reservation did the Petitioner bring forth any of the general allegations set out in its Complaint to the District Court. Sometime in February of 1979, the Winnebago Indians mentioned their concerns regarding the bald eagle. At no time during the planning of the proposed transmission line did the Petitioner manifest any concern over the environment and specifically the bald eagle to either of these Respondents. This suit was filed on April 30, 1979, approximately one week after the Win-

nebago Tribe of Nebraska was informed of the condemnation proceedings that would be brought against allotted lands.

The Winnebago Tribe of Nebraska brought suit challenging the Army Corps of Engineers negative declaration and the issuance of a permit to the Iowa Public Service Company allowing the crossing of the Missouri River with a 345 KV high-voltage transmission line. Petitioner sought temporary and permanent injunctive relief pending compliance with the National Environment Policy Act. A consolidated trial on the merits began on May 21, 1979. The Trial Court held on June 15, 1979, that Petitioner had failed to meet its burden of proof and dismissed the Complaint. Appeal was brought to the United States Court of Appeals for the Eighth Circuit, and, on March 13, 1980, the Eighth Circuit affirmed the trial court by holding that the tribe had failed to meet its burden of raising a substantial environmental issue.

SUMMARY OF ARGUMENT

1. Whether the Petitioner failed to carry its burden of proof before the District Court.

The Petitioner had the burden of proof to demonstrate the existence of a substantial environmental issue. The Petitioner chose to plead and, therefore, prove there existed a substantial environmental issue because of the threat of high-voltage transmission lines to American bald eagles. The record demonstrates that the Petitioner failed to substantiate its claim. There was no evidence introduced that would indicate an additional high-voltage transmission line will be a threat to the

existence and proliferation of the American bald eagle.

2. Whether the decision of the District Judge sitting as a finder of fact was so clearly wrong that the decision may be overturned by applicable standards of review.

There is a general maxim that holds that an appellate court can review only questions of law and not questions of fact. On appeal, fact findings of the trial court in cases tried without a jury are to be given the same effect or weight as jury verdicts, and such findings of fact will not be disturbed or reversed other than for reasons that would justify interference by the appellate court with jury verdicts. Appellate courts have held that the trier of fact is in a superior position to review evidence adduced at trial. The trial court can make a determination based upon such evidence better than an appellate court based solely upon the record.

3. Whether there was major federal action because of alleged illegal segmentation.

The District Court applied the standard of judicial review and found that the Corp's administrative record, as demonstrated by the extrinsic evidence, was sufficient to support a negative declaration statement. Petitioner did not present evidence that the project should be adjudged to have a significant environmental impact. Therefore, the District Court acted properly in finding that even if the Petitioner had met its burden of proof, the alleged deficient record did not exist after reviewing the extrinsic evidence.

4. Whether any of the reasons set forth in Rule 17 of the Supreme Court of the United States are present to confer a review of this case.

Petitioner has failed to show in its Petition For Writ Of Certiorari that the decision of the Eighth Circuit in this case is in conflict with any other Circuit. Secondly, there is no showing by Petitioner that the Eighth Circuit has far departed from accepted judicial proceedings or sanctioned such a departure by the District Court.

ARGUMENT

I.

Whether the petitioner failed to carry its burden of proof before the District Court.

It has been unequivocally held that it is incumbent upon a plaintiff to make a prima facie showing and raise a "substantial environmental issue." This burden of proof is a threshold requirement that triggers the court to examine and weigh the evidence of both the plaintiff and the agency to determine whether the agency acted reasonably. In *Hiatt Grain & Feed, Inc. v. Bergland,* 446 F. Supp. 457, 490 (D. Kan. 1978), the Court succinctly articulated what the duty of the court should be in reviewing an environmental issue. This case was a class action suit brought by the plaintiff's seeking a permanent injunction. The District Court held, *inter alia,* that the plaintiffs lacked standing. Relief was denied. In addressing the burden of proof issue, the Court held:

> A court should not undertake to review the decision not to file an EIS unless the plaintiff is

> able to raise a "substantial environmental issue." . . . Plaintiffs must allege facts which, if true, would constitute a "substantial" impact upon the environment.

Id. at 490 (citations omitted).

Petitioner claims to have shown three issues: (1) the segmentation and complete omission of environmental consideration of 98% of the project; (2) a failure to consider real alternatives; and (3) the threat of high-voltage transmission lines to bald eagles. The last issue is the only issue, of the three, that addresses itself to an environmental question. The first two "issues" the petitioner raised address themselves to whether or not the Corps acted reasonably by issuing a Section 10 permit along with a negative declaration statement. These particular issues are to be addressed only after a plaintiff has established a substantial environmental issue. *Hiatt Grain & Feed, Inc., supra,* articulated a two-step process of review. Before a district court can review a decision not to file an EIS, it first must determine if the plaintiff has raised a "substantial environmental issue." Then, once a substantial environmental issue is raised, the court can then address itself to whether an EIS is necessary. The petitioner in its argument integrates questions regarding the propriety of the Corps' actions with whether a substantial environmental issue exists. Therefore, the segmentation issue and the failure to consider alternatives are to be reviewed after the petitioner has completed the first step of carrying the burden of proof. This leaves the threat of high-voltage transmission lines to bald eagles as the only issue the petitioner raised to demonstrate a substantial environmental issue.

From the evidence adduced during trial, it was obvious that the petitioner failed to raise a substantial environmental issue in regard to the American bald eagle. Evidence demonstrates that the Corps did consider several different varieties of birds, but failed to specifically comment upon the American bald eagle. Petitioner had an opportunity during the trial to introduce evidence that would sustain its claim that the American bald eagle would be substantially harmed by the project. This, the petitioner failed to do.

Presently, there exists, and has existed since 1968, a high-voltage transmission line that runs parallel, only 150 feet apart, from the proposed transmission line. The existing transmission line runs approximately one mile west of the river, parallel to the proposed line, then goes two miles south, and then one mile west before the lines separate. With the existence of a high-voltage transmission line, there existed an opportunity for the petitioner to measure the damage or harm to the environment (including American bald eagles). However, no such evidence was submitted depicting any substantial impact that the existing high-voltage transmission line has caused, or what an additional high-voltage transmission line may cause upon the environment. Petitioner charged that the Corps failed to consider the environmental consequences because the assessment neglected to consider the local eagle population around the river as well as hunting and nesting grounds. This argument does not raise a substantial environmental issue because the evidence does not show that the eagle has been, nor will be, impacted by the construction of the proposed transmission line. There is no evidence to indicate why the Corps should consider the American bald eagle any differently than it considered the other species of birds addressed in its

negative declaration. Furthermore, there is no evidence that the American bald eagle is found to roost within two to three miles of the river crossing. And there is no evidence that the American bald eagle is found in the vicinity of the line route within the borders of the reservation.

Petitioner claims to have established that there have been dead bald eagles found along the Missouri River from *both* Iowa and Nebraska sides of the river. The testimony of Dr. Louis Locke, a wildlife pathologist for the U.S. Fish and Wildlife Service, did not indicate that dead bald eagles were found along the Missouri River on the Nebraska side. Furthermore, Dr. Locke's testimony only established that somewhere along the Missouri River, as it parallels the Iowa border, dead eagles were found. Dr. Locke did not indicate that any American bald eagles have ever been found in the area of the proposed transmission line.

II.

Whether the decision of the District Judge sitting as a finder of fact was so clearly wrong that the decision may be overturned by applicable standards of review.

An appellate court can review the findings of fact by the lower court, but it cannot disturb these findings unless they are contrary to, or inconsistent with, or without support of the evidence. In other words, the appellate court should not disturb a finding of fact, unless it is clearly wrong or clearly against the weight of the evidence. This does not mean, however, that the appellate court has an unrestricted power to dis-

turb fact findings of the trial court. To the contrary, it has been held in many jurisdictions that where review in a non-jury case is of the entire record, the court may review the sufficiency of the evidence and test the propriety of the findings below, excepting findings sufficiently supported by the record and a product of orderly and logical deductive process, even though it might have reached different conclusions. 5A C.J.S. Appeal & Error § 1656 (1)(2)(3).

During the trial on the merits the trial judge was faced with many questions of fact. Based upon the evidence adduced at trial, the trial judge was able to come to the proper conclusions of fact, overruling the petitioner's request for an injunction. Now, the petitioner comes before this Court raising some of the same questions of fact claiming that the trial judge erred in his conclusions. To overrule the lower court's findings, this Court must determine that these findings were contrary to, or inconsistent with, or without support of the evidence.

The first question of fact at issue was whether the Corps' issuance of a negative declaration was unreasonable and amounted to an arbitrary and capricious action. The standard of review as correctly applied by the District Court was the rule of reasonableness. This was demonstrated in *Minnesota Pub. Interest Research Group v. Butz,* 498 F. 2d 1314, 1320 (8th Cir. 1974) which was an action by a non-profit corporation seeking injunctive relief against logging. The Court found that the activities constituted major federal action so that an impact statement was required.

Petitioner urges that the issuance of the negative declaration was unreasonable because the Corps only

assessed the river crossing area. Petitioner argues that the entire length of the transmission line from Raun, Iowa, to Hoskins, Nebraska, should have been considered before the Corps could issue the negative declaration. It was clearly demonstrated by the respondents that the Corps acted consistently within its power of review by restricting its assessment to the river crossing, wherein it receives its jurisdiction by the River and Harbor Act of 1899, 33 U.S.C. § 403.

The District Court found that the Corps acted within the scope of its authority by evaluating only the river crossing. This conclusion was based upon the evidence presented before the trier of fact and was evaluated by him using the standard of "reasonableness". The District Court did not find that the Corps was acting in an arbitrary or capricious manner in only assessing the river crossing because there was no evidence introduced that would show a need for the Corps to assess areas west of the river crossing. It was clearly supported by the evidence that it would have been unreasonable for the Corps to expand its scope of the assessment to include areas west of the river crossing. It would be unreasonable to have that federal agency assess an area some 60 miles from its primary jurisdiction, the river. This is especially true when the area presently possesses five to six high-voltage transmission lines, and there was no evidence presented that these lines have ever killed or injured an American bald eagle.

The second question of fact is whether the issuance of a Section 10 permit is a "major federal action." The District Court clearly demonstrated in its Memorandum Opinion that it was fully versed on the proper standards of review regarding the National Environ-

mental Policy Act, 42 U.S.C. § 4321, *et seq.*

The standards which automatically trigger a formal EIS are: (1) a major federal action; and (2) a significant effect on the quality of the human environment. The District Court carefully dissected the facts to determine whether there existed a major federal action. Major federal action occurs when a federal agency is deeply involved in a particular project and/or the project is financed by federal funding. This was unequivocally held in *Indian Lookout Alliance v. Volpe,* 484 F. 2d 11, 14, (8th Cir. 1973). That was an action regarding a highway construction project that was found to be improperly segmented so as to avoid assessing the entire project.

In the case at bar it is undisputed that there is no federal financing involved which would trigger major federal action. However, petitioner urges that the involvement of the Army Corps of Engineers is of such a magnitude that this involvement in and of itself constitutes a major federal action. These respondents strongly oppose such a proposition and the District Court affirmed the Respondent's position.

To constitute a major federal action when no federal funding exists, as in the instant case, the federal agency's involvement must be substantial. If the federal agency's involvement is minor, then according to *Dalsis v. Hills,* 424 F. Supp. 784 (W.D.N.Y. 1976), there must be federal funding to effectuate major federal action. *Dalsis* was an action wherein the plaintiffs were seeking an injunction to cause the builder of a proposed shopping mall to acquire an environmental impact statement. The Court found there was major federal action, but denied the plaintiffs' motion for a

lack of showing that irreparable harm would result.

The District Court properly found that the Corps' involvement was minor. The crossing of the Missouri River is the only triggering device that causes any federal action. If the river crossing was not necessary, there would be no question regarding federal involvement. The trier of fact found that the transmission line was not illegally segmented at the river crossing so as to avoid having to comply with NEPA and thereby having to compile an EIS on the river crossing as well as one on the entire line. It was brought forth by the evidence that due to the nature of the construction and the standards of the industry, IPS would build and string the transmission line across the Missouri River to the Nebraska side. It is impossible for the power lines to be connected by the two companies midway between the east and west banks of the Missouri River. Therefore, since the line was not illegally segmented, the only federal action occurred with the issuance of the Section 10 permit. This involvement by the Corps was found by the District Court to be a minor aspect of the project.

The District Court's findings of fact should be unequivocally upheld by this Court. This conclusion is based upon the fact that the evidence clearly substantiates and supports the trier of fact's conclusions. These conclusions cannot be disturbed because they are not contrary to, or inconsistent with, or without support of the evidence. There is no major federal action existing in the project to construct the proposed 65-mile transmission line. Furthermore, the District Court properly reviewed the evidence regarding the negative declaration and applied the standard of reasonableness to that evidence. In that light the trier of

fact found that the Corps had acted properly and had not issued the permit arbitrarily or capriciously. There is not sufficient evidence for this Court to disturb the District Court's fact findings and the same should be regarded as conclusive and binding.

III.

Whether there was a major federal action because of alleged illegal segmentation.

Petitioner alleges impropriety in the method used by the respondents, NPPD and IPS, wherein they designated each company's responsibility, for the construction of the line from beginning to end. These respondents assert that this allegation is totally without foundation. The evidence adduced at trial demonstrated the proper standards of the industry regarding how responsibility is to be designated when two companies contract for the construction of a single project. IPS by its own volition, and without any illegal intention, contracted that it would construct the power line from its own substation in Raun, Iowa, to the west bank of the Missouri River. There is no evidence that would indicate that this contract with NPPD was improper or illegal so as to avoid having to compile an EIS on the entire line.

This District Court has already demonstrated that it can recognize when someone has illegally segmented a project so as to avoid having to compile an EIS. The Court demonstrated this ability in *Patterson v. Exon,* 415 F. Supp. 1276 (D. Neb. 1976). This was a highway construction project where it was found that the defendant illegally segmented a construction project

so as to avoid having to compile an EIS. The District Court Judge, the trier of fact in that case, presided over the instant case. This particular set of circumstances shows that if illegal segmentation had occurred, the trier of fact would have sustained such a violation.

Since the Trial Judge did not find the project to constitute a major federal action, he still reviewed the question of whether the Corps had issued a negative declaration, stating that an EIS was unnecessary. To review the process in which the Corps arrived at its determination, the District Court applied the principles set forth in *Pokorny v. Costle,* 464 F. Supp. 1273 (D. Neb. 1979). *Pokorny* was an action by a city's mayor to restrain construction of a city project. The ground for the injunctive relief was that the Environmental Protection Agency's decision to refrain from preparing an EIS was unreasonable. The District Court held that the EPA did not act unreasonably and denied injunctive relief. In that holding, the Court clearly set forth the standards of judicial review to be applied when the Court is faced with determining the reasonableness of a federal agency's actions. After setting out the burden of proof to be demonstrated by the plaintiff to raise a substantial environmental issue, the Court held:

> Upon a prima facie demonstration of an incomplete development of a written record by a federal agency, extrinsic evidence may be considered in a judicial evaluation of the reasonableness of an administrative decision to issue a negative declaration.

Id. at 1276. Therefore, if a plaintiff demonstrates the existence of a "substantial environmental issue" because of a deficiency in the negative declaration, as

alleged by the petitioner in the instant case, the court's inquiry is not limited to the allegedly deficient administrative record. The policy behind allowing the judge to turn to the extrinsic evidence was articulated also in *Pokorny*:

> The policy behind requiring a succinct evaluation of a project's environmental impact rather than a detailed statement is related to the degree of significance. Environmental protection would not be served by requiring an EIS when a project is insignificant within the meaning of NEPA.

Id. at 1277.

The District Court applied this standard and found that a negative declaration was proper. The District Court further found that even if the record had been deficient, the extrinsic evidence showed that the petitioner could not meet its burden of proof.

At this time the river crossing has been completed and the issue should be considered moot.

IV.

Whether any of the reasons set forth in Rule 17 of the Supreme Court of the United States are present to confer a review of this case.

Rule 17 notes that a review on a Writ of Certiorari is not a right. It specifies that this Court will consider a matter for review only under certain important circumstances.

In general terms, as applied to this case, there would have to be a conflict of opinion with another

Court of Appeals or a matter would have to be under consideration which had not been previously decided by this Court. In addition, this Court will review a decision if a Court of Appeals has made a great departure from the usual course of judicial proceedings or allowed a District Court to do so.

It is true that Rule 17 indicates that these guidelines are not the full measure of this Court's discretion. However, this Court should strictly apply these guidelines with regard to this case. This case does not involve any unique federal questions or issues that are being treated differently among various Courts of Appeals. The United States District Court for the District of Nebraska simply applied established standards and refused to grant the Petitioner injunctive relief on the basis that the Petitioner had failed to carry its burden of proof. There were various factual determinations that had to be made by the District Judge. These factual decisions were made. Review of a case based solely upon factual decisions made by the District Judge in an injunctive action is not appropriate under the guidelines set forth by Rule 17.

CONCLUSION

The Trial Court clearly acted properly as did the Eighth Circuit and their decisions should be affirmed. The Petitioner failed to carry its burden of proof because it could not demonstrate the existence of any substantial environmental issues. The Corps' action was correct in issuing a negative declaration. An EIS is not necessary because there is no major federal action significantly affecting the quality of the human en-

vironment. The Petition For Writ of Certiorari should be denied.

Respectfully submitted,

IOWA PUBLIC SERVICE COMPANY and NEBRASKA PUBLIC POWER DISTRICT, Appellees,

By: James J. DeMars
Barlow, Johnson, DeMars & Flodman
P.O. Box 81686
Lincoln, NE 68501
(402) 475-4240